Supreme Court, U.S.
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No. 92-1582

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES SCULLY, Superintendent
Greenhaven Correctional Facility,

Petitioner,

- v -

ANGEL CLAUDIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in holding that respondent had a Sixth Amendment right to counsel on his pretrial appeal to the New York Court of Appeals from the Appellate Division's reversal, on the prosecution's appeal, of the trial court's suppression ruling in respondent's favor.

2. Whether the Second Circuit erred in holding that respondent's Sixth Amendment right to the effective assistance of appellate counsel was violated when his attorney failed to raise, in the New York Court of Appeals, a State constitutional right to counsel claim which, though decided adversely by the Appellate Division, presented a question of first impression, and was supported by numerous Court of Appeals' precedents.

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The Respondent, Angel Claudio, respectfully requests that this Court deny the Petition for Certiorari seeking review of the Second Circuit's decision in this case. The Court's opinion is reported at 982 F.2d 798 (1992) and is set forth at pages 3a-35a of the Petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Respondent adopts the statement of facts in the majority opinion of the Second Circuit set forth at Pet. App. 5a-10a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Second Circuit's determination, that on his pretrial appeal to the New York Court of Appeals, respondent had a Sixth Amendment right to counsel, is correct under this Court's prior rulings, including *Ross v. Moffitt*, 417 U.S. 600 (1974), and it does not, therefore, raise any question that merits review.

Petitioner's contention that the "Second Circuit has created a major new exception to the rule of *Ross v. Moffitt*, 417 U.S. 600 (1974)" (Pet. 7), misstates the issue, misreads *Ross*, and ignores entirely this Court's rulings that guarantee criminal defendants the right to counsel at all critical stages of the proceedings against them. *See United States v. Wade*, 388 U.S. 218, 227 (1967); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961).

Contrary to petitioner's claim (Pet. 9, 10), *Ross v. Moffitt* did not, irrespective of the stage of the criminal process at which a discretionary appeal is taken, purport to create a rule governing all such appeals. Then Justice Rehnquist, writing for the Court, articulated the critical distinction between the post-conviction appellate process, in which the defendant is "seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below," and the pretrial stages of a criminal prosecution, in which the defendant "needs an attorney ... to protect him against being 'haled into court' by the State and stripped of his presumption of innocence...." *Ross v. Moffitt*, 417 U.S. at 610-11.

The Second Circuit assessed correctly the soundness of this distinction and applied the *Ross* holding appropriately in this case. As the court pointed out, respondent's appeal to the New York Court of Appeals was part of the pretrial process at which he was still entitled to the presumption of innocence and at which he was entitled to contest the admissibility of evidence against him. Pet. App. 13a. It was also the final phase of an appellate process that the prosecution, not he, had initiated. *Id.* Because the trial court

had suppressed respondent's confession, not only did the prosecution have to appeal, they were required by New York Law to certify that without the confession, the case against respondent could not go forward. N.Y. Crim. Proc. Law §450.50 (McKinney 1983); Pet. App. 12a. To argue, as petitioner does, that in this circumstance a defendant can be required to go it alone, is fanciful.

Both the language and logic of *Ross* dictate that the critical factor as to whether the Sixth Amendment right to counsel attaches at a pretrial stage of a criminal proceeding is not whether the defendant's appeal is discretionary but whether the appeal is a critical stage of the pretrial process. Not only does Justice Rehnquist's "shield-sword" metaphor apply directly to any critical stage of the trial process, this Court, in deciding "criticalness," has always focused on whether "[w]hat happens ... may affect the whole trial," *Hamilton v. Alabama*, 368 U.S. at 54, and whether "potential substantial prejudice to defendant's rights inheres in the ... ability of counsel to help avoid that prejudice." *United State v. Wade*, *supra*, 388 U.S. at 227.

Petitioner is simply wrong, therefore, in asserting that "the rationale of *Ross* is applicable to any second-level discretionary appeal, whether it occurs before or after trial." Pet. 9. To ignore the distinction between a discretionary post-conviction appeal by a defendant who is seeking to overturn his conviction, and a discretionary pretrial appeal in which the defendant seeks to preserve the trial court's suppression ruling in his favor would create the following illogical, and arguably ludicrous, pretrial scenario.

Under petitioner's theory, an indicted defendant who, indisputably, has a right to counsel at arraignment, at any post-indictment identification procedure, at all pretrial suppression hearings and on an interlocutory appeal by the prosecution, may have that chain of representation broken when he is granted review by the State's highest court of the intermediate court's interlocutory ruling. But once he loses that appeal and the case is remanded for trial, his constitutional entitlement to counsel, as it must, resumes and remains in place through completion of his initial post-

conviction appeal. That this hiatus in representation occurs at the most significant pretrial event in the case — the decision by the State's highest court as to whether the prosecution can proceed — does not trouble petitioner is one thing; that it is an acceptable part of the landscape of the criminal process that *Ross v. Moffitt*, or any decision of this Court, contemplates, is quite something else.

Petitioner's equation of respondent's post-indictment, pretrial appeal, the sole purpose of which was to reinstate the trial court's suppression order, with pre-indictment, non-custodial questioning (Pet. 10), further exposes the weakness of petitioner's argument. Petitioner can point to no case in which this Court has held the Sixth Amendment counsel guarantee inapplicable to any post-indictment stage of the proceeding other than the post-conviction discretionary appeal in *Moffitt*, and the certiorari and collateral attack proceedings in *Wainwright v. Torna*, 455 U.S. 586 (1982), and *Coleman v. Thompson*, 111 S. Ct. 2546 (1991). Indeed, even at pretrial stages where counsel's advocacy role is much more circumscribed than it is on a defendant's pretrial appeal to a state's highest court, the Sixth Amendment's right to counsel is indefeasible. *See Kirby v. Illinois*, 406 U.S. 682 (1972). *See also*, *United States v. Ash*, 413 U.S. 300, 310 (1973).

In sum, not only does the Second Circuit's decision create no exception to any rule announced in *Ross v. Moffitt*, it falls easily within the *Ross* rationale. Because the decision is also fully consistent with the many decisions mandating that the Sixth Amendment guarantees a defendant the right to counsel at all critical stages of the proceedings, it has established no "new rule" and thus raises no question that implicates the principles of *Teague v. Lane*, 489 U.S. 288, 299 (1989) (plurality op.), or *Butler v. McKellar*, 494 U.S. 407 (1990), and its progeny.

Contrary to petitioner's assertion, the Second Circuit's ruling will not "open the doors of the federal courts to a substantial number of new challenges to state criminal convictions." Pet. 11. All that petitioner musters in support of his floodgate-like argument is his statement that "pretrial appeals from rulings suppressing evidence or dismissing indictments are not at all unusual." *Id.* It

should be apparent, however, that this case does not involve all pretrial appeals by the prosecution.

As there is already a federal constitutional right to counsel on a first appeal, even when it is post-conviction, all that this case concerns are those few appeals, in states which have a two-tier appellate process, in which at least eight events must occur: (a) the intermediate appellate court has reversed a suppression or dismissal ruling adverse to the prosecution, (b) the State's high court has granted review, (c) the State's high court has affirmed the intermediate appellate court's ruling, (d) the defendant is convicted, (e) the conviction is affirmed on appeal at both levels of the State's appellate process, (f) the defendant claims that his representation before the State's high court on his pretrial appeal was constitutionally inadequate, (g) the defendant adequately presents that claim to the State courts and (h) the State court rejects the claim.

Therefore, to reach a federal habeas court in a case such as this, the preconditions are so numerous that a duplication of its procedural history would be extremely rare. That petitioner has failed to point to any case that comes close to replicating this one attests to its highly unique procedural posture. Consequently, the Second Circuit's decision will have little, if any, impact on the work of the federal courts.

Petitioner also has pointed to no decision of any court with which the Second Circuit's decision conflicts. For these reasons, review by the Court is unwarranted.

2. The Second Circuit's ruling, that by failing to protect his client's rights under state law, a lawyer can deprive his client of his Sixth Amendment right to the effective assistance of counsel, is correct, and does not merit review.

In determining that respondent's Sixth Amendment right to the effective assistance of counsel was violated by his attorney's failure to raise a viable State constitutional claim, the Second Circuit cited five cases that accept the proposition that an ineffective assistance

claim can be predicated on an attorney's failure to secure rights afforded by state law to his or her client. *See* Pet. App. 13a, n.5. Petitioner strains mightily to separate these cases from that logical principle by labeling them as cases in which "the omitted claims had roots in federal as well as state law." Pet. 12.

Apart from the fact that none of these decisions even discussed "roots," the underlying principle, that counsel's failure to protect a client's state constitutional and statutory entitlements can violate the Sixth Amendment, is so fundamentally sound as to merit little discussion. To conclude otherwise, would be to accept the proposition that, no matter how inept counsel's performance may be, the Sixth Amendment guarantee of effective assistance can *never* be implicated when such ineptitude results only in the loss of a defendant's state law rights. Though he dissented for other reasons, Judge Newman also rejected this argument, stating his agreement with the majority "that the federally guaranteed right to the effective assistance of counsel includes some obligation of counsel to assert claims and defenses grounded in state as well as federal law." Pet. App. 24a.[1] Since petitioner cites no contrary

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[1] Judge Newman appears unnecessarily hesitant in so concluding. He acknowledges that language in *Smith v. Murray*, 477 U.S. 527 (1986), lends support to his conclusion. He could have found even greater support, however, in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). In that case, the Court held that although *Stone v. Powell*, 428 U.S. 465 (1976), precludes the availability of federal habeas corpus for Fourth Amendment violations, habeas corpus remains available for Sixth Amendment ineffective assistance claims that are predicated on counsel's failure to protect a defendant's Fourth Amendment rights. The same logic applies here because, as in *Kimmelman*, the common denominator is the Sixth Amendment's guarantee of effective assistance, not the source of the substantive right forfeited by counsel's incompetence. After *Stone v. Powell*, for federal habeas purposes, a substantive Fourth Amendment claim is as unavailable as a state law claim always has been. Insofar as *Kimmelman* affords habeas relief where the predicate for ineffective assistance nonetheless is grounded in the Fourth Amendment, its logic commands the same result when the predicate is grounded in state law. *See Withrow v. Williams*, 1993 WL 119753 (U.S.) 4

(continued...)

authority, there exists no reason for this Court to address it.

3. The Second Circuit's decision, that on the facts of this case, respondent was denied his Sixth Amendment right to the effective assistance of counsel, is correct and presents no question of significance to Sixth Amendment jurisprudence or to federalism that merits review.

It is settled beyond dispute that the Sixth Amendment guarantees a defendant the right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 394-97 (1985). The only question, therefore, is whether the court below applied that principle correctly to the facts of the case. Because the issue is fact-specific, there is no reason for the Court to depart from its general practice of not reviewing discrete factual applications of undisputed constitutional principles.

The Second Circuit's determination that respondent's counsel's failure to raise his State constitutional claim fell "outside the wide range of professionally competent assistance" (Pet. App. 18a) required by *Strickland v. Washington*, 466 U.S. 668, 690 (1984), was correct. By 1983, no attorney practicing criminal law in New York could fail to raise a State right to counsel claim in a case such as this and be deemed to have rendered effective assistance. By then, the New York Court of Appeals' record of construing the State constitutional right to counsel more broadly than this Court had construed the Sixth Amendment right was legendary and a matter of common knowledge to competent practitioners. *See People v. Bing*, 76 N.Y.2d 331, 351, 559 N.Y.S.2d 474, 486 (1990) (op. of Kaye, J.) ("[o]ver the past several decades, this court applying the New York State Constitution evolved a body of law that 'constitute[s] the strongest protection of the right to counsel anywhere in the country.'").

Indeed, in this case, the District Attorney and the Appellate

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[1](...continued)

(*Kimmelman* rests on fundamental distinction between Fourth Amendment which confers no trial right and Sixth Amendment, which does).

Division both recognized that the right to counsel provision of Article I, §6 of the New York Constitution was directly implicated. Pet. App. 72a, 73a. The prosecutor raised and briefed the issue fully and the Appellate Division conceded not only that respondent's State right to counsel had attached when respondent confessed, but whether it had been violated was a "question of first impression." Pet. App. 73a. Only respondent's appellate counsel failed to recognize the importance of the State Constitution. That he continued to do so on respondent's appeal to the Court of Appeals and filed a brief that the court below found "was nearly identical to the brief he submitted to the Appellate Division, and contained no new information or arguments to refute the Appellate Division decision," (Pet. App. 19a), is what rendered his representation so egregious.[2]

Judge Newman errs (Pet. App. 31a, 32a) when he argues that *solely* because the Appellate Division decided the State constitutional claim adversely to respondent, respondent's attorney cannot be faulted for not raising it in the New York Court of Appeals.

First, as Judge Newman recognized, this Court's decision in *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940), which held that a state intermediate appellate court's state law

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[2] The Court of Appeals brief was a virtual replica of counsel's Appellate Division brief. It contained the same typographical errors as did the Appellate Division brief and made inappropriate references, such as referring to "this court" when citing to an Appellate Division decision. All that differentiated the Court of Appeals brief from the Appellate Division brief was the cover page.

A competent attorney would not submit to the State's highest court a brief which, *in haec verba*, replicates the losing brief in the lower court. A competent attorney would not disregard the lower court's favorable concession that the state constitutional right had attached, especially when simultaneously, the court had held that the Sixth Amendment right to counsel had *not* attached. A competent attorney would not fail to make even the slightest reference to the intermediate court's ruling. Respondent's counsel failed on each of these counts.

determinations are applicable in the same case and to the same parties in federal court, "is not precisely applicable to a case such as this where the question is whether appellate counsel was constitutionally deficient in failing to seek reversal of the intermediate court's decision...." Pet. App. 32a, n.9.

Second, Judge Newman's acknowledged "*per se* position" (*id.*) is premised both on an erroneous assessment of the function of appellate counsel and of the institutional role of the New York Court of Appeals. To insist that an attorney can never be constitutionally ineffective when for no strategic purpose he abandons, on appeal to New York's highest court, an issue that the Appellate Division has denominated one of first impression, deprecates the essence of appellate counsel's role on such an appeal. It is a perspective that overlooks entirely that the Appellate Division's decision, in the Court of Appeals' judgment, may be completely erroneous.

One need not catalogue the hundreds, perhaps thousands of cases, in which the Court of Appeals has, over the years, reversed Appellate Division rulings because they were based on misreadings of New York law. The Court of Appeals sits, as does this Court, to review in its discretion, cases that it considers to raise legal issues of general importance. Foremost among such matters are, by definition, "questions of first impression," which affect the interpretation of the State's Constitution. The Appellate Division's interpretation of the Constitution, in the very case which the Court of Appeals grants review, can never constitute the final word. That is the institutional prerogative of the Court of Appeals. Consequently, to argue as do petitioner and Judge Newman that, in the presentation of a case to the Court of Appeals, defense counsel *always* may ignore the issue of the correctness of the Appellate Division's ruling and never be deemed incompetent for doing so, is illogical. It is precisely because the business of any State's high court is to correct intermediate appellate court error that counsel's abandonment of a meritorious claim cannot be deemed competent. When no reason of strategy justifies its abandonment, counsel's obligation can be nothing less than to seek reversal of the intermediate court's ruling. *Cf. Jones v. Barnes*, 463 U.S. 745 (1983).

Moreover, contrary to Judge Newman's view (Pet. App. 33a), the role of a federal habeas court is not "broadened" when it undertakes to determine the competence of counsel's decision to abandon, in the State's highest court, a viable state constitutional claim. That to assess the competence of counsel's performance a federal court may have to examine state law imposes no new task on the court. As is true of any case in which the violation of any federal constitutional right has, as its referent substantive state law, a federal habeas court cannot avoid determining the meaning of state law in this context as well. *See, e.g., Bishop v. Wood*, 426 U.S. 341 (1976). Indeed, unless the interpretation given state law by the lower federal courts constitutes plain error, this Court will defer to the lower federal courts because the "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2822 (1992) (joint op.), quoting *Frisby v. Schultz*, 487 U.S. 474, 482 (1988).

In this regard, petitioner's dual claims that (1) respondent's counsel was entitled to rely on the intervening Court of Appeals decision in *People v. Beam*, 57 N.Y.2d 241, 455 N.Y.S.2d 575 (1982) (Pet. 15), and (2) that the State constitutional claim was not, because of a procedural bar, raisable in the Court of Appeals (Pet. 16), also fail to enhance his quest for review.

Given this Court's deference to interpretations of state law by the lower federal courts, the interpretation given *Beam* by the majority below, unless clearly erroneous, should be of little interest to this Court. That it is not clearly erroneous is apparent from both the majority's analysis (Pet. App. 15a-17a), and Judge Newman's acknowledgment that *Beam* "is arguably distinguishable, as the majority in this case contends...." Pet. App. 31a.

The same standard of review applies to petitioner's state law procedural bar argument. The majority below interpreted New York law and concluded that petitioner's claim was "undermined by the Appellate Division's decision to reach the state issue and respondent's own brief which argued the merits of the state claim before the Court of Appeals." Pet. App. 14a, n.7. It also determined that the cases relied upon by petitioner were "distinguishable from the case before the court as they do not

involve claims that are strongly related and based on the same set of facts." *Id.* Judge Newman, in dissent, also made no claim that the majority's understanding of New York law was erroneous. Pet. App. 35a. As this Court does not concern itself, except in the rarest instance, with issues of state law, petitioner's disagreements with the Second Circuit's analysis of state law do not warrant the Court's attention.[3]

In sum, this case presents no issues worthy of review by the Court. It involves nothing more than the factually driven issue of whether the Sixth Amendment's guarantee of the effective

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[3] It is worth noting, however, that the Second Circuit's understanding of New York law is sound. In *People v. Santorelli*, 80 N.Y.2d 875, 587 N.Y.S.2d 601 (1992), the Court of Appeals rejected a prosecution claim virtually identical to the one pressed here. There the defendant had prevailed at the trial level on a free speech claim. On the prosecution's appeal, the intermediate appellate court reversed, rejecting the speech claim and also rejecting the defendant's equal protection claim. On the defendant's appeal to the Court of Appeals, the prosecution argued that, under N.Y. Crim. Proc. Law §470.35 (McKinney 1983), the defendant's equal protection claim was barred because the prosecution's appeal was taken only from the trial court's free speech ruling. The Court of Appeals rejected that argument because the equal protection claim "was expressly passed upon by County Court, and its disposition of that claim was a necessary basis for its order of reversal of the Rochester City Court which had dismissed the informations." *Id.* at 876.

As to petitioner's speculation that the Court of Appeals' disclaimer footnote (Pet. App. 57a), "may invoke the bar of Crim. Proc. Law § 470.15, because defendant did not raise the state constitution in the suppression court," or in the Court of Appeals (Pet. 19), it is answer enough that the Court of Appeals has consistently held "that a claimed deprivation of the State constitutional right to counsel may be raised on appeal, notwithstanding that the issue was not preserved by having been specifically raised in a suppression motion or at trial." *People v. Kinchen*, 60 N.Y.2d 772, 773, 469 N.Y.S.2d 680, 681 (1983).

assistance counsel was abridged. Its factual and procedural uniqueness renders it an inappropriate vehicle for the articulation by the Court of any significant principle of broad application.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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